Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

FARRELL LINES INCORPORATED,

Petitioner,

v.

JOSEPH DINO, PATRICIA DINO, AND AMERICAN MARITIME SERVICE OF NEW YORK, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents fundamental questions concerning shipowner liability for personal injuries to longshore workers in third-party actions under § 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court established the parameters of shipowner's liability under the LHWCA and held that a shipowner has a duty to turnover a vessel in a reasonably safe condition and to warn the stevedore of hidden dangers which might be confronted by the stevedore's longshore employees.

In the present case, which involves a shipboard accident to a longshore worker, the court of appeals reversed the district court's grant of summary judgment in favor of Petitioner, a shipowner, for two reasons. First, it held that *Petitioner* had failed to present evidence that an obvious shipboard hazard could have been avoided, and thus shifted the established burden of proof from plaintiff to defendant. Second, it held that anecdotal statements indicating that longshoremen work in all weather conditions under time pressures were sufficient to establish Petitioner's negligence because Petitioner should have expected that the longshore worker, or his stevedore employer, would not have corrected or avoided an obvious hazard. As such, the court of appeals found that Petitioner's negligence could be established solely on universal realities inherent in longshoring which exist in every port in the United States, effectively creating an absolute standard of liability applicable to all shipowners in any case involving the *Scindia* "turnover" duty.

It is submitted that a writ of certiorari is warranted in order to resolve the following questions:

1) Did the court of appeals depart from the accepted and usual course of judicial proceedings when it shifted the burden of proving whether an obvious hazard could have been avoided from the plaintiff-longshore worker to the defendant-shipowner? That is, should a shipowner be required to prove that it was *not* negligent under § 5(b) of the LHWCA?

2) Did the court of appeals, contrary to *Scindia*, create a heretofore unrecognized absolute basis of liability under § 5(b) of the LHWCA, akin to the abrogated warranty of seaworthiness, by permitting the longshore worker to establish shipowner negligence based on nothing more than generalizations about the nature of the stevedoring industry, and not upon facts specific to the case?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Farrell Lines Incorporated states that it is a wholly owned subsidiary of P&O Nedlloyd Limited and that Farrell Lines Incorporated has no publicly-traded stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. The District Court's Decision	2
B. The Third Circuit's Decision	3
Reasons for Granting the Writ	5
1. The Court Of Appeals Departed From The Accepted And Usual Course Of Judicial Proceedings By Requiring That The Shipowner Prove It Was Not Negligent Under The LHWCA	5

Contents

Page

2. The Court Of Appeals Has Created An Absolute Basis Of Liability Applicable To Shipowners Not Contemplated By This Court In Scindia 9

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Biggs v. Logicon, Inc., 663 F.2d 52 (8th Cir. 1981) .. 9

Bjaranson v. Botelho Shipping Corp., 873 F.2d 1204 (9th Cir. 1989) 9, 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8

Clay v. Daiichi Shipping, et al., 74 F. Supp. 2d 665 (E.D. LA. 1999) 10

Greenwood v. Societe Francaise De, 111 F.3d 1239 (5th Cir. 1997) 10

Huggins v. Teamsters, 585 F. Supp 148 (E.D. Pa. 1984) 10

Keller v. United States, 38 F.3d 16 (1st Cir. 1994) ... 9

Kirsch v. Plovidba, 971 F.2d 1026 (3d Cir. 1992) ..... *passim*

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) ..... *passim*

Cited Authorities

Page

Statutes:

28 U.S.C.A. § 1254(1) 1

33 U.S.C. § 905(b) ..... *passim*

Rule:

Fed. R. Civ. P. 56 8

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed December 5, 2000 .... 1a

Appendix B — Letter-opinion And Order Of The United States District Court For The District Of New Jersey Dated And Filed December 1, 1999 ..... 19a

Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated February 27, 2001 ..... 55a

Appendix D — Relevant Statute 57a

Petitioner respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (Mckee, C.J., joined by Rendell and Stapleton, JJ.) reversing the decision of the United States District Court for the District of New Jersey (Lechner, D.J.) is unpublished and produced in the Appendix to this Petition (App. A at 1a). The decision of the district court granting Petitioner's summary judgment motion is also unpublished and produced in the Appendix (App. B at 19a). The order of the court of appeals denying rehearing and rehearing *en banc* is not published and produced in the Appendix (App. C at 55a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 5, 2000, (App. A at 17a) and denied rehearing and rehearing *en banc* on February 27, 2001 (App. C at 56a). This petition is filed within ninety (90) days of the date of the denial of rehearing and rehearing *en banc*. As such, the jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of § 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), ("LHWCA") are reprinted in the Appendix (App. D at 57a).

STATEMENT OF THE CASE

The present case involves a suit brought by Respondents, Joseph and Patricia Dino, against Petitioner, Farrell Lines Incorporated ("Farrell"), for damages arising from the alleged negligence of Farrell in discharging its turnover duty under section 5(b) of the LHWCA. Respondents allege that Petitioner negligently turned over its vessel causing Joseph Dino (hereafter "Respondent Dino") to sustain personal injuries while he was performing his duties as a longshore worker. The district court granted Petitioner's motion for summary judgment, but the court of appeals reversed holding that Petitioner did not submit any evidence that it was not negligent and that generalizations concerning longshore work conditions which exist throughout the country were sufficient to prove Petitioner should have known Respondent would not avoid a known and obvious hazard.

A. THE DISTRICT COURT'S DECISION

The district court below granted Petitioner's motion for summary judgment. The facts before the district court were as follows: after the vessel docked in Port Elizabeth, New Jersey, Petitioner hired Respondent American Maritime Services of New York, Inc. to remove ice and snow from the ship's deck. After the ice and snow removal work was concluded, the stevedore, Respondent Dino's employer, Maher Terminals Inc., inspected the vessel. The stevedore found the deck free of snow and ice, determined that it was reasonably safe, accepted turnover of the vessel and ordered cargo operations to commence. Respondent Dino, an experienced hatch boss in charge of a gang of longshoremen, testified that he noticed the starboard passageway had some obvious patches of ice, but the deck

had been salted. Respondent Dino testified that he worked and observed conditions in the starboard passageway area for approximately twenty minutes before he fell while rapidly stepping backwards on the ship's deck to avoid being hit by a hatch cover being lifted by a co-worker who was operating a shore crane.

The district court granted summary judgment to Petitioner. It held that if there was ice and snow on the deck which caused Respondent to slip and fall, that condition was open and obvious to him prior to the accident. Further, the district court held that Respondent Dino had not proven under *Kirsch v. Plovidba,* 971 F.2d 1026 (3d Cir. 1992), that the condition which caused him to fall was either practically unavoidable, or that Petitioner should have known by virtue of custom or contract that Respondent would not have avoided the condition. In short, the district court granted Petitioner's motion for summary judgment based upon the clearly articulated holding in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), that the primary responsibility for avoiding injuries due to obvious hazards is placed upon the expert stevedore-employer.

B. THE THIRD CIRCUIT'S DECISION

On appeal, the Third Circuit acknowledged the well established holding in *Scindia* that a shipowner is generally not liable to a longshoreman injured by an obvious hazard, but nevertheless reversed the grant of summary judgment to Petitioner. The Third Circuit so held for two reasons: first, it found that *Petitioner* submitted no evidence that the longshoreman could have avoided the ice; second, it found that even if the ice could have been avoided or removed, Respondents' anecdotal evidence that longshoremen,

in general, work year round in any weather and do so under time pressure to handle cargo expeditiously, was sufficient to prove that Petitioner should have known that a dangerous icy condition, even if avoidable, would not have been avoided by Respondent Dino.

It is submitted that in reversing the district court, the court of appeals has erroneously placed upon the shipowner the burden of proving that a hazardous condition known by the longshore worker could have been avoided. In other words, the decision of the court of appeals has departed from the accepted and usual course of judicial proceedings by requiring the shipowner under section 5(b) of the LHWCA to show that it was not negligent.

In addition, by ruling that anecdotal, generalized evidence was sufficient to prove Petitioner should have known Respondent Dino would not avoid a known obvious hazard, the court of appeals has created a factual predicate which would be applicable in any turnover duty case brought under LHWCA. The decision below eliminates the shipowner's ability to obtain summary judgment in turnover duty cases regardless of the specific facts involved. As such, the decision creates an absolute basis of liability against shipowners which is precluded by the 1972 amendments to the Act and *Scindia*.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY REQUIRING THAT THE SHIPOWNER PROVE IT WAS NOT NEGLIGENT UNDER THE LHWCA

Section 5(b) of LHWCA, 33 U.S.C. § 905(b), grants longshore and harbor workers a statutory cause of action against shipowners sounding in negligence. That provision of the LHWCA was explained by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and further interpreted by district courts and courts of appeal across the country, including the Third Circuit in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992). In both *Scindia* and *Kirsch*, the plaintiff longshore worker was required to prove that the shipowner was negligent in turning over its vessel. No matter how section 5(b) of the LHWCA and *Scindia* were interpreted before the decision of the court of appeals in this case, no court ever required the shipowner defendant to prove it was not negligent in order to prevail in a motion for summary judgment.

As noted by this Court in *Scindia*, the 1972 amendments to the LHWCA radically altered the scheme of compensation for injuries to such workers. Those amendments dramatically increased compensation payments by stevedores to longshore workers while eliminating longshore workers' virtually absolute right to recover against shipowners under the warranty of unseaworthiness. Prior to the amendments, a longshore worker only needed to prove that the vessel contained an unsafe injury-causing condition. After the amendments, longshore workers were required to prove that

the shipowner was negligent. This negligence was comparable to land-based tort standards and was to evolve as a matter of federal common law. *Id.* at 166.

In *Scindia*, the Court held that the vessel owes a duty to the stevedore and its longshore employees to exercise due care under the circumstances. *Id.* at 160. In setting forth the duty owed at the time the vessel is turned over to longshore workers for cargo operations, this Court stated as follows:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. . . . The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Id. at 167.

In addition to the above described turnover duty, the *Scindia* Court set forth two other duties which the shipowner owed to the longshore worker: a duty to exercise due care if it actively involved itself in cargo operations, and a duty to intervene if the ship's crew knew or was charged with knowing that the stevedore was "obviously improvident" by proceeding with cargo operations in the face of a dangerous condition. However, the Court specifically held that absent contract, positive law, or custom to the contrary, shipowners had no continuing duty to learn of dangerous conditions by inspecting or supervising stevedoring operations. *Scindia*, 451 U.S. at 172.

In *Kirsch*, the Third Circuit applied the *Scindia* turnover duty. There, the plaintiff-longshoreman alleged that the shipowner breached its turnover duty by failing to clean an oil spill which had completely covered an area of the ship where longshoremen were conducting cargo operations. In analyzing whether the oil slick could constitute a breach of the turnover duty, the court of appeals ruled:

> We therefore conclude that a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely.

Id. at 1031.

Therefore, the court of appeals in *Kirsch* held that a shipowner could be liable for not eliminating an open and obvious hazard if, by custom or contract, the shipowner should have known that the longshore worker would not have

avoided an otherwise avoidable and obvious hazard. In so ruling, the Third Circuit relied upon that portion of the decision in *Scindia* which held that absent a contract, positive law, or custom to the contrary, the shipowner has no continuing duty to learn of dangerous conditions by inspecting or supervising the stevedoring operation. *Scindia*, 451 U.S. at 172. The court thus held that custom or contract could supplement a shipowner's duty to longshoremen.

As such, the *Kirsch* Court affirmed summary judgment for the shipowner holding that it was not negligent with regard to the oil spill inasmuch as the longshoremen could have avoided the hazardous oil spill by treating or cleaning it up themselves or by telling the ship's crew to do so. *Kirsch*, 971 F.2d at 1034.

Summary judgment motions under Fed. R. Civ. P. 56 require that the non-moving party make a showing sufficient to establish the existence of every element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In third-party cases under § 5(b) of LHWCA, the longshoreman has the burden of proving the shipowner's negligence. Here, in reversing the district court's grant of summary judgment to Petitioner, the court of appeals held that *Petitioner* had not presented evidence that the alleged icy condition of the deck was avoidable. In so holding, the court stated "here there is no evidence that the longshoreman could have avoided the ice." App. A at 14a. By requiring the shipowner to present evidence that the longshore worker could have avoided the hazardous condition known to him, the court of appeals is now requiring the shipowner to first prove that it is not negligent on account of the existence of

the obvious and hazardous condition known to the longshore worker. This is in direct conflict with the burden as set forth in every case that has interpreted *Scindia* and the LHWCA, including *Kirsch*, *supra*; *Keller v. United States*, 38 F.3d 16 (1st Cir. 1994); *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204 (9th Cir. 1989); *Biggs v. Logicon, Inc.*, 663 F.2d 52 (8th Cir. 1981), which require that the plaintiff-longshoreman must show that the defendant-shipowner was negligent. As such, a writ of certiorari to the court of appeals is warranted.

2. THE COURT OF APPEALS HAS CREATED AN ABSOLUTE BASIS OF LIABILITY APPLICABLE TO SHIPOWNERS NOT CONTEMPLATED BY THIS COURT IN SCINDIA

The only evidence presented to the district court which could have remotely suggested that Petitioner should have known that Respondent Dino would not have avoided an obvious and avoidable icy condition was that longshoremen generally work throughout the year in any weather under time sensitive circumstances. This simple anecdotal truism does not constitute, nor was it presented as, a unique custom at Port Elizabeth, New Jersey, nor is it evidence of a particular contractual requirement between Respondent's employer and Petitioner. The fact that longshoremen work year-round under a time schedule is a common reality in the longshore industry at every port and marine terminal in this country, and is therefore, applicable to each and every longshoreman nationwide. Nowhere in *Scindia* was it suggested that this basic fact common to all longshoremen could provide a sufficient basis to hold a shipowner negligent in the performance of its turnover duty. Moreover, the Third Circuit itself in *Kirsch* granted summary judgment to a shipowner

arising from the plaintiff's slip and fall on an open and obvious oil spill without ever suggesting that the time constraints imposed upon longshoremen in general could have excused them from avoiding obvious hazards or could have rendered shipowners liable in negligence.

On the contrary, no court has ever previously held that non-case specific, general work conditions under which longshore workers practice their occupation was a sufficient basis for holding a shipowner negligent under the LHWCA. *Clay v. Daiichi Shipping, et al.*, 74 F. Supp. 2d 665 (E.D. LA. 1999); *see Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1246 (5th Cir. 1997); *Huggins v. Teamsters*, 585 F. Supp 148, 150-51 (E.D. Pa. 1984) (". . . mere inferences, conjecture, speculation or suspicion are insufficient to establish a material fact upon which to base a denial of summary judgment").

As the Ninth Circuit has observed, certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around such conditions. *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 204, 208 (9th Cir. 1989). The Third Circuit in *Kirsch* cited *Bjaranson* approvingly and held that a shipowner can ordinarily reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid these hazards where practical to do so. *Kirsch*, 971 F.2d at 1030.

It is submitted that a writ of certiorari is warranted to review the court of appeal's substantial departure from what this Court in *Scindia* established as duties shipowners owe to longshore workers. In reversing summary judgment, the court of appeals has created an absolute standard of

liability based solely on generalities applicable to all shipowners nationwide under any circumstance involving the turnover duty. It is plainly inconsistent with *Scindia* and the decisions of other courts of appeal which have reviewed this issue.

Further, under its decision, the court of appeals will inadvertently make working conditions on the waterfront more dangerous. Stevedores could now permit their longshore employees to work through or ignore obvious hazards, confident in the knowledge that their significant workers' compensation payments may be recouped through third-party actions against shipowners based upon this absolute standard of determining shipowners' negligence which would be applicable in all turnover duty cases.

CONCLUSION

For the reasons set forth above, this Court should grant this petition in order to review fundamental issues affecting the proper burden of proof in longshore workers' third-party actions. The Court's guidance is also required to correct judicial erosion of *Scindia*'s negligence principles so that standards of care comparable to absolute liability will not again be applied to shipowners. If the decision of the court of appeals is not reviewed, the stevedore-employer, who is immune from tort liability under § 5(b) of the LHWCA and is thus beyond the reach of being impleaded into such third-party actions, will have no incentive to carry out its primary duty of ensuring a safe workplace for its employees.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED DECEMBER 5, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-6119

JOSEPH DINO; PATRICIA DINO,

Appellants

v.

FARRELL LINES, INC.; SS ARGONAUT; ABC VESSEL OWNER 1-10, (being fictitious and unknown); PDQ VESSEL LESSEE 1-10, (being fictitious and unknown); JOHN DOE MASTER OFFICER 1-10, (being fictitious and unknown); XYZ MAINTENANCE COMPANY 1-10, (being fictitious and unknown)

FARRELL LINES, INC.,

Third-Party Plaintiff

v.

AMERICAN MARITIME SERVICES, INC.,

Third-Party Defendant

Appendix A

Joseph Dino and Patricia Dino,

Appellants

Appeal from the Judgment of
the United States District Court
for the District of New Jersey
Civil Action No. 99-cv-01155
District Judge: Honorable Alfred J. Lechner, Jr.

Argued: November 6, 2000

Before: McKEE, RENDELL, and STAPLETON,
Circuit Judges

(Opinion filed: December 5, 2000)

* * *

OPINION OF THE COURT

McKEE, *Circuit Judge.*

Joseph Dino appeals the district court's grant of summary judgment to defendant shipowner in an action Dino brought for personal injuries under § 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b). Dino sought to recover for injuries arising out of his slip and fall on the deck of defendant's cargo vessel. For the reasons that follow, we will reverse and remand for further proceedings consistent with this opinion.

Appendix A

I. Background[1]

Dino was an experienced longshoreman employee of Maher Terminals, Inc., a stevedoring company in Port Elizabeth, New Jersey. Dino was working as a hatch boss at the time of the accident that gave rise to this litigation. An essential part of Dino's job involved managing a gang — a group of workers assigned to a specified area — and ensuring that cargo was unloaded from ships to the dock. Defendant and third-party plaintiff, Farrell Lines, Inc. owned and operated a ship called the SS Argonaut.

On January 17, 1997 the SS Argonaut's Master called ahead to Charles Andrews, Farrell's Port Manager, to request assistance in removing ice and snow from the ship's deck upon its arrival. Andrews in turn hired American Maritime Services Inc. (AMS) to perform snow and ice removal services when the ship arrived in port.

The SS Argonaut arrived at port the next day at 6:48 am and by all accounts the ship was coated with snow and ice. It is undisputed that it was a very cold day with morning temperatures hovering around 18.[2] The deck log suggests that the AMS crew did not board the ship until about 7:30 am to begin de-icing.

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1. Inasmuch as we are reviewing a grant of summary judgment, we must accept Dino's well pleaded allegations s true, and view the record in the light most favorable to him. *See Jones v. School Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999).

2. Dino offers several photographs of the ship's deck taken several hours after the incident.

Appendix A

Maher's stevedore operations began at about 8:00 am, approximately thirty minutes after the de-icing crew boarded. Dino, the hatch boss, was in charge of overseeing unloading cargo from the number two batch. Scott Stahl, the ship superintendent that Maher employed, was in charge of the entire unloading operation. Stahl testified that he inspected the vessel before it was turned over to Maher. His declaration states as follows:

> I arrived for work that day at approximately 7:00AM. . . Shortly after my arrival at the terminal, I boarded the SS ARGONAUT to inspect the vessel to determine if stevedoring operations could be performed safely and for defects or unsafe conditions aboard the vessel that might make cargo operations dangerous. I performed this inspection with the knowledge that the vessel arrived with snow and ice accumulations that required snow and ice removal services. . . I found the vessel to be free of ice and snow in areas where cargo operations were to take place. I saw evidence of snow and ice removal activity in that I saw rock salt spread on the decks in the areas where the longshoremen would be working. . . At approximately 8:00 AM, when the vessel was turned over to Maher for cargo operations, the areas on deck where longshoremen would be working were free of snow and ice and reasonably safe for cargo operations.

Stahl's Verified Declaration at ¶¶ 13-16. Additionally, Andrews testified that he inspected the deck to ensure that

AMS workers were clearing the deck of snow and ice, and saw that the deck was being salted and shoveled. He stated he had no problem traversing the vessel.

Later that morning, Dino was called to the ship because a new crane operator was having a problem. Dino states:

> When I went up the gangway I observed no warning signs of any type which in any way related to ice or other hazardous conditions. When I went up the starboard passageway, it was covered with ice and had not been shoveled. Some salt had been put down but it was essentially covered with ice. All of the equipment on the deck . . . were covered with ice. All of the containers were ice-coated and I would note that the coverings with ice were heavier and more complete than shown in photographs 000505 through 000507.[3]

Dino's Certification at ¶ 7. As the crane operator was lifting the hatch, the Dino moved back and slipped. He grabbed for the rail, but the ice on the rail and the ice on the deck combined to cause him to fall. Stahl stated that he went to Dino and observed that the area was "free and clear of snow and ice." Stahl's Certification at ¶ 23.

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3. Longshoreman Manuel Trueba also stated in his certified statement that the deck of the ship was "extremely slippery and virtually everything was covered with ice." Trueba's Certification at ¶ 8. Longshoreman Roberto Ruiz also stated that the "deck area, including walkways and cross passageways were covered with ice all morning." Ruiz's Certification at ¶ 5.

Dino subsequently sued Farrell in the New Jersey Superior Court pursuant to § 905(b) of the LHWCA. Farrell removed the case to the United States District Court for the District of New Jersey based on diversity of citizenship under 28 U.S.C. § 1332(a) and admiralty jurisdiction under 28 U.S.C. § 1333(1). Farrell then filed a third-party complaint against AMS.

Farrell filed a motion for summary judgment which AMS joined. The district court granted that motion in favor of Farrell and AMS, and against Dino, and this appeal followed.

II. Standard of Review

Plaintiffs challenge the district court's grant of summary judgement on the ground that genuine issues of material fact exist as to the duty of the shipowner.[4] An appellate court reviewing the granting of a summary judgment motion is governed by the same test applied by the district court. *See Carter v. Rafferty*, 826 F.2d 1299, 1304 (3d Cir. 1987). Under that test, summary judgment is appropriate when "the

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4. In addition, Dino's statement of the issues presented for review states that "[t]he District Court erred in denying the request to extend discovery" but he does not mention this issue in the substance of his brief. *See* Plaintiffs Brief at 3. AMS correctly points out that under Federal Rule of Civil Procedure 72(a), plaintiff needed to file timely objections to the Magistrate Judge's September 13, 1999 ruling denying Dino's motion to extend discovery in order for the district court to consider the objections. *See* AMS Brief at 25. Moreover, since Dino failed to properly include this issue in the body of its brief to us, this issue has now been waived. *See* Farrell's Brief at 42-43.

pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). We exercise "plenary review over the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts." *Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994).

III. Discussion.

Prior to 1972, longshoremen were afforded the protection of a warranty of seaworthiness. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Under that warranty, shipowners were strictly liable for injuries to longshoreman, even if the injuries were caused by the stevedore contracted to load the cargo. The stevedore was immune from suit by the longshoreman because the LHWCA, like most worker's compensation schemes, traded a system of benefits for employer immunity from tort suit. *See Ryan v. Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U.S. 124, 129-30 (1946).

In 1972, Congress amended the LHWCA.[5] The amendment eliminated the warranty of seaworthiness and

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5. 33 U.S.C. § 905(b) currently provides:

b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such

(Cont'd)

created a cause of action for negligence in favor of an injured longshoreman and against a shipowner. *See Edmonds v. Compaignie Generale Transatlantique*, 443 U.S. 256, 262 (1979). The amendment did not, however, delineate acts or omissions which would amount to negligence. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981). Instead, it left the scope of the duty owed longshoreman to "be resolved through the application of the accepted principles

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(Cont'd)

> person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

of tort law and the ordinary process of litigation." *Id.* at 165-66 (citing H.R. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972)). However, in *Scindia Steam Navigation Co.*, the Supreme Court outlined three general duties that shipowners owed to longshoremen. Shipowners have a duty to: (1) turn the vessel over in a reasonably safe condition and to warn the stevedore of unsafe conditions on the ship; (2) exercise due care to protect longshoreman from hazards when the shipowner maintains active control of the vessel during the stevedoring operation; and (3) to intervene when the shipowner has actual knowledge of the hazard and knows, or should know, that the stevedore cannot be relied upon to remedy it. *Id.* at 166-67.

This suit focuses upon the turnover duty, which is comprised both of a duty to provide safe conditions and a duty to warn of dangers:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the

> performance of his work. (citations omitted). The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Id. at 166-67.

We refined the shipowner's duty of care in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992). There, an experienced longshoreman slipped on an oil slick on the deck and fell eight feet. The issue before us was when does "a shipowner breach its basic duty to provide safe working conditions by turning over a ship with an obvious hazard." *Id.* at 1029. In answering this question, we first explained that the crucial difference between the turnover duty and the duty to intervene. "[T]he turnover duty covers the shipowner's conduct before cargo operations have begun, while the duty to intervene addresses conduct after turnover." *Id.* We noted that:

> *Scindia* does not cast any doubt on the shipowner's duty to inspect the ship for hazards before turning the ship over to the stevedore, because inspection is integral to providing the stevedore with a reasonably safe workplace, a duty that *Scindia* explicitly recognized.

Id. In general, therefore, a shipowner would not be liable to a longshoreman injured by an obvious hazard because the shipowner can rely on its longshoremen employees to "notice obvious hazards and take steps consistent with its expertise to avoid those hazards where practical to do so." *Id.* at 1030. However, we also concluded:

> in some cases, a shipowner cannot reasonably rely on longshore workers to avoid obvious hazards, and therefore the courts have rejected a bright-line rule that a shipowner can never be liable for injuries caused by obvious hazards. For example, *if a hazard is obvious yet practically unavoidable, the shipowner can hardly reasonably expect the stevedore or the longshore worker to avoid the hazard.* Frequently, this question is one of degree, for the standard is not whether it was absolutely impossible to avoid the hazard, but whether, under all the circumstances, safer alternatives were impractical (citations omitted). *In many cases, this fact-intensive question will be inappropriate to decide on summary judgment and must be left for the jury.*

Id. (emphasis added).

However, under some circumstances, a shipowner may be liable even if the hazard was both obvious and it was practical to avoid it. *Id.* at 1031. When customary practice suggests that the shipowner should know "that longshore workers frequently confront rather than avoid a type of obvious hazard," the shipowner call not escape liability by

relying upon the longshoreman's ability to detect and avoid the hazard. *Id.* In such a situation "the shipowner may be negligent in not eliminating the hazard, although plaintiff's recovery may be reduced according to his or her comparative fault." *Id.* (citing *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25, 27-28 (3d Cir. 1981) (shipowner found negligent because he should have known that plaintiff might use a negligent method to remove stuck hatch covers)).

Accordingly, the following rule emerges from *Kirsch*:

> a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or *would not* avoid the hazard and conduct cargo operations safely.

Id. (emphasis added).

Reading *Scindia* and *Kirsch*, together, we must determine whether there is a genuine issue of material fact as to any of the following issues: (1) was there a dangerous condition on the ship when it was turned over, i.e. whether the deck laden with snow and ice when the cargo operations began; (2) if so, was it obvious;[6] (3) if the icy condition was obvious, was it practical to avoid the ice; (4) if it was practical to avoid the ice, is there evidence that it is customary for experienced longshoremen to confront the icy conditions rather then stop working or remedying it.

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6. If it was not obvious the shipowner had a duty to warn Dino.

When this record is viewed against this background, it is obvious that several genuine issues of material fact exist and that summary judgment is therefore inappropriate here. Dino asserts that the ship was ice laden when the discharge operations, began at approximately 8:00 am. He has submitted his own certification to that effect as well as certifications of Manuel Trueba, and Roberto Ruiz; each of whom state that the deck was filled with ice during cargo operations. Dino has also produced photographs of the ship allegedly taken over two hours after he fell. Those photographs show snow and ice on the deck. Dino also argues that the record establishes that AMS only de-iced the ship for about thirty minutes, and that was not long enough to effectively remove the hazard. Farrell and AMS dispute this assertion by relying on Stahl's testimony that he boarded the ship after 7:00 am to inspect it and "found the vessel to be free of ice and snow in areas where cargo operations were to take place." Stahl's Verification at ¶ 15. He further stated that the cargo areas remained free of ice and snow at the time the vessel was turned over to Maher. Stahl's Verification at ¶ 16.

A reasonable jury may conclude that Stahl is credible and that the ship was safe when Dino fell. However, at the summary judgment level, "all inferences, doubts and issues of credibility must be resolved against the moving party." *Meyer v. Reigel Products Corp.*, 720 F.2d 303, 307 (3d Cir. 1983). As noted above, all evidence "must be viewed in the light most favorable to the nonmoving party and all inferences must be drawn in that party's favor." *Id.* Here, the district court appears to have ignored that principle at each facet of its analysis.

Appendix A

The declarations by Dino, Ruiz, and Trueba are sufficient to establish an icy condition on the ship.[7] Even assuming that the condition was obvious to Dino (as is clearly suggested by Dino's own exhibits), there remains a genuine issue of material fact as to how practical it was to avoid the hazard. In other words, were practical safer alternatives available which would have allowed plaintiff to avoid contact with the danger. In *Kirsch* we found that the oil slick was so large that longshoremen could not have done their jobs without walking through it. *Kirsch*, 971 F.2d at 1033. However, we still determined that the hazard was avoidable because the longshoreman could have: 1) cleaned up the spill; 2) told the ship's crew to clean it up; or 3) covered the spill with sawdust. *Id.* We also pointed out that the Occupational Safety and Hazard Administration's regulations indicate that stevedores are considered competent to treat oil spills. *Id.* (citing 29 C.F.R. § 1918.91(c) (1991)).

Here, there is no evidence that the longshoremen could have avoided the ice. In fact, the shipowner hired someone else to clean up the ice. Moreover, as we cautioned in *Kirsch*, this is a fact-intensive question that should normally be resolved by a jury. *Id.* at 1030 (citing example *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir. 1990) (upholding jury verdict for plaintiff, even though water and oil on the main deck were clearly visible, because there was some testimony that alternative passage was locked)).

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7. We note that it is possible that plaintiff could present evidence at trial to show that the icy condition in the specific area where plaintiff fell might not have been obvious. At this stage, however, the record does not reflect such evidence.

Finally, even if Dino could have avoided or removed the ice, there is yet another issue of fact as to whether the shipowner should have known that plaintiff would not have avoided the danger. Dino presented declarations of three experienced longshoreman (including his own) that established that it is customary at Port Elizabeth to confront and work through weather related problems such as snow and ice. Longshoreman Manuel Trueba, who has been a longshoreman for thirty-six years, explained in his certified statement that longshoremen are under tremendous time pressure when unloading ships:

> The rate that we unload containers is checked on an hourly basis and, if we fall even slightly below the hourly rate that is expected, there are immediate complaints and inquiries as to what the problem is. We work in all sorts of weather and do not stop for rain, snow, cold, wind or, in this case ice. The ice that we saw on the ship, while unusually thick, is the type of condition that we just have to confront and work around as best we can in order to keep the ship on schedule.

Trueba's Certification at ¶ 5. *See* also Dino's Certification at ¶ 11; Ruiz's Certification at ¶ 11. Dino argues that "[t]his raises a genuine issue of material fact as to whether Defendant, knowing the ship was iced up would know the stevedores would confront the situation rather than cease cargo operations." Plaintiff's Brief at 14-15. We agree.

Appendix A

IV. Conclusion

For the foregoing reasons, the district court's grant of summary judgment be reversed and remanded for further proceedings consistent with this opinion.

TO THE CLERK OF THE COURT:

Please file the foregoing Opinion.

By the Court:

/s/ Theodore A. McKee
CIRCUIT JUDGE

DATED: December 5, 2000

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-6119

JOSEPH DINO; PATRICIA DINO,

Appellants

v.

FARRELL LINES, INC.; SS ARGONAUT; ABC VESSEL OWNER 1-10, (being fictitious and unknown); PDQ VESSEL LESSEE 1-10, (being fictitious and unknown); JOHN DOE MASTER OFFICER 1-10, (being fictitious and unknown); XYZ MAINTENANCE COMPANY 1-10, (being fictitious and unknown)

FARRELL LINES, INC.,

Third-Party Plaintiff

v.

AMERICAN MARITIME SERVICES, INC.,

Third-Party Defendant

Joseph Dino and Patricia Dino,

Appellants

Appendix A

Appeal from the Judgment of
the United States District Court
for the District of New Jersey
Civil Action No. 99-cv-01155
District Judge: Honorable Alfred J. Lechner, Jr.

Argued: November 6, 2000

Before: McKEE, RENDELL, and STAPLETON,
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court the District of New Jersey and was argued before a panel of this court on November 6, 2000.

On consideration whereof, it is now ORDERED and ADJUDGED that the judgment of the United States District Court for the District of New Jersey decided on December 1, 1999 is reversed and remanded for further proceedings in consistent with this court's opinion.

ATTEST:

s/ Marcia M. Waldron
CLERK

DATED: December 5, 2000

APPENDIX B — LETTER-OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED DECEMBER 1, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST., ROOM 5054
P.O. BOX 999
NEWARK, NJ 07101-0999

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

1 December 1999

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

Robert G. Leonard
John Scott
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Morristown, New Jersey 07960
(Counsel for Plaintiffs)

Appendix B

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Newark, New Jersey 07102-5003
(Counsel for Defendant American Maritime Services, Inc.)

Re: *Joseph Dino and Patricia Dino v. Farrell Lines, Inc., SS Argonaut v. American Maritime Services, Inc.*, Civil Action No. 99-1155 (AJL)

Counsel:

This is an action by plaintiffs Joseph Dino ("Dino") and Patricia Dino (collectively "Plaintiffs"), against defendants, Farrell Lines, Inc., SS Argonaut ("Farrell") and also, by third-party plaintiff, Farrell, against third party-defendant, American Maritime Services, Inc. ("AMS") (collectively "Defendants"). Plaintiffs filed a Complaint (the "Complaint") in the Superior Court of New Jersey, Law Division, Union County alleging damages, under Section 905(b) of the Longshore and Harbor Workers' Compensation Act (the "Act" or "LHWCA"), 33 U.S.C. § 905(b), for personal

injuries sustained from a slip and fall aboard SS Argonaut. Patricia Dino, Dino's wife, asserted a derivative claim based upon the loss of consortium, services and society. Currently pending is Farrell's motion for summary judgement (the "Motion for Summary Judgment")[1], in which AMS has

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1. In support of the Motion for Summary Judgment Farrell submitted:

1. Verified Declaration of Carol N. Lambos (the "Lambos Declaration"), attaching Exhibits A through N;

2. Statement of Uncontested Facts pursuant to L.Civ.R. 56.1 ("Rule 56.1 Statement");

3. Memorandum of Law in Support of Defendant's Motion for Summary Judgment (the "Moving Brief");

4. Verified Declaration of Joseph Farley (the "Farley Declaration") and

5. Reply Memorandum of Law in Support of Defendant's Motion for Summary Judgment (the "Reply Brief").

In support of the Motion for Summary Judgment AMS submitted:

1. Verified Declaration of Matthew Mahoney (the "Mahoney Declaration") and

2. Memorandum of Law in Support of Farrell Lines Incorporated and Joinder in that Motion (the "AMS Brief").

In opposition to the Motion for Summary Judgment Plaintiffs submitted:

(Cont'd)

joined. The Motion for Summary Judgment is granted for the reasons set out below.

Facts

A. *Parties*

Plaintiffs are New Jersey residents. *See* Complaint. Dino was employed as a longshoreman by Maher Terminals, Inc. ("Maher"), an independent stevedore company, in Port Elizabeth, New Jersey. *See id.*, Count 1, at ¶ 4. Dino, worked as a longshore worker for more than thirty years, and at the time of the accident worked as a hatch boss for Maher. *See* Lambos Declaration, Exhibit J (deposition transcript of Joseph Dino) ("J. Dino Dep.") at 15-21. Dino began his career as a holdsman and through the years was promoted to dockman and deckman. *See id.* at 16-21. As a hatch boss, Dino had his own gang,[2] which was referred to as "Dino's gang"; it consisted of nine workers. *See id.* at 24. Dino described his job as "[g]etting the gang together, seeing that they produce, or any problems with them tying up the ships,

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(Cont'd)

1. Certification of R. Gregory Leonard (the "Leonard Certification"), attaching Exhibits A through E;

2. Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment of Farrell Lines, Inc. and American Maritime Service of New York, Inc. (the "Opposition Brief").

2. The term "gang" refers to the longshore workers assigned to work a specific area of the ship.

shifting ships, general management of the gang and their production." *Id.* at 21.

Farrell is a Delaware corporation with its principal place of business located in the New York, New York. *See* Notice of Removal ¶ 1. Farrell was "at all relevant times the operator, owner pro hac vice and bareboat charterer of the SS Argonaut." *Id.* Farrell conducts business in New Jersey and maintains a business address in Elizabeth, New Jersey. *See* Complaint, Count 1, ¶ 1. SS Argonaut is an American-flag container ship operated by Farrell. *See* Lambos Declaration ¶ 3.

AMS is a general maritime services independent contractor. *See* Mahoney Declaration ¶ 3. AMS was engaged by Farrell on 18 January 1997 to perform snow and ice removal services on the deck of SS Argonaut. *See id.*

B. *Procedural History*

On 6 January 1999, Plaintiffs filed the Complaint alleging injuries in relation to an accident that occurred aboard SS Argonaut 18 January 1997. *See* Complaint. The Defendants filed a notice of removal alleging admiralty jurisdiction, pursuant to 28 U.S.C. § 1333, and diversity jurisdiction, pursuant to 28 U.S.C. § 1332.

On 23 March 1999, Farrell filed an answer to the Complaint and also filed a third-party complaint (the "Third-Party Complaint") naming AMS as a third-party defendant. On 15 April 1999, a scheduling order ("15 April 1999

Scheduling Order") was issued setting 30 July 1999 as the cutoff for discovery.[3]

C. *Background*

1. *17 January 1997*

On 17 January 1997, Charles Andrews ("Andrews"), Farrell's Port Manager, received a phone call from the Master of SS Argonaut concerning an accumulation of snow and ice on the deck of the incoming vessel. *See* Lambos Declaration, Exhibit H (the deposition testimony of Charles Andrews) ("Andrews Dep.") at 7, 35. The Master also informed Andrews that the crew was cleaning the deck, but that further assistance might be needed upon arrival of SS Argonaut at Port Elizabeth. *See id.* at 35.

In response to the call, Andrews retained AMS to perform snow and ice removal services on SS Argonaut upon its arrival at Maher on 18 January 1997. *See id.* AMS agreed to send a crew to remove the snow and ice and then perform the unlashing of the ship. Andrews also communicated with Maher, the stevedore company employed to unload SS Argonaut, to warn it about the condition of the vessel. *See id.* at 116; Lambos Declaration, Exhibit K (Verified Declaration by Scott Stahl of Maher) ("Stahl Declaration")

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3. As part of the 15 April 1999 Scheduling Order, the parties were required to answer interrogatories from the court no later than 24 May 1999. The Plaintiffs have not done so. Moreover, Plaintiffs have not offered expert witness data, as required by Rule 26(a)(2), even though the 15 April 1999 Scheduling Order required disclosure of such information be made by 18 June 1999.

Appendix B

¶ 12 ("On or about January 17, 1997, I was notified that Farrell warned Maher that the SS ARGONAUT would be arriving with snow and ice accumulated on the vessel. I was also informed that Farrell had arranged for shore workers to perform snow and ice removal services upon the vessel's arrival at Maher.").

2. *18 January 1997: Before Turn Over*

Dino arrived at work at approximately 6:00 o'clock a.m. on 18 January 1997. *See* Leonard Certification, Exhibit B (Certification of Joseph Dino) ("Dino Certification") ¶ 2. SS Argonaut docked on the starboard side of its berth at Maher terminal and "finished with engines" was ordered at 6:48 o'clock a.m. on 18 January 1997. *See* Lambos Declaration, Exhibit L (Deck Log of SS Argonaut) ("Deck Log"). Dino assisted in tying up SS Argonaut shortly before 7:00 o'clock a.m. *See* J. Dino Dep. at 37; Dino Certification ¶ 2. At 7:30 o'clock a.m. the AMS snow and ice removal crew boarded the vessel to begin snow and ice removal. *See* Deck Log.

The Ship Superintendent from Maher, Scott Stahl ("Stahl") testified that he boarded SS Argonaut and conducted an inspection before the turnover and before stevedore operations began at 8:00 o'clock a.m. *See* Stahl Declaration ¶¶ 1, 14. Stahl testified that upon turnover "the areas on deck where longshoremen would be working were free of snow and ice and reasonably safe for cargo operations." *See id.* at ¶ 16. Specifically, Stahl stated:

Appendix B

> Shortly after my arrival at the terminal, I boarded the SS ARGONAUT to inspect the vessel to determine if stevedoring operations could be performed safely and for defects and unsafe conditions aboard the vessel that might make cargo operations dangerous. **I performed this inspection with the knowledge that the vessel arrived with snow and ice accumulations that required snow and ice removal services.** To perform my inspection I walked about the areas of the vessel where cargo operations would be performed including but not limited to the in-shore decks, the weather decks and cross walks between the hatches. In addition, I performed a visual inspection of the areas surrounding the cargo working area of the vessel. **There were no conditions or equipment aboard the vessel at that time that would have prevented my complete inspection of the vessel or obscured my views of the cargo operations area.**

Id. at ¶ 14 (emphasis added). Stahl indicated that it is known in the stevedore industry that at Maher during "cold weather it is common for vessels to arrive at the terminal with accumulations of snow and ice." *Id.* at ¶ 18. Joseph Farley, Safety Director for Maher, testified that it is known both at Maher and "in the stevedoring industry in general, that if snow and ice accumulates [sic] during stevedoring operations which render work conditions unsafe, longshoremen should stop work." Farley Declaration ¶ 6.

Appendix B

On the morning of 18 January 1997, Stahl testified that in the course of his inspection he

> found the vessel to be free of ice and snow in areas where cargo operations were to take place. [He] saw evidence of snow and ice removal activity in that [he] saw rock salt spread on the decks and in the areas where the longshoremen would be working. Moreover, [he] saw extra bags of rock salt left on the deck. Since [he] was aware that snow and ice on a vessel could pose a risk during cargo operations, [he] took special care with [his] inspection to see that the snow and ice removal operation was properly accomplished. At the end of [his] inspection, [he] was satisfied that the vessel was reasonably safe for stevedoring operations.

Stahl Declaration at ¶ 15. Further, Stahl commented that the deck area "remained safe throughout the entire day." *Id.* at ¶ 16.

3. *Existence of Ice on Deck*

Andrews testified that at approximately 6:30 o'clock a.m.[4] on 18 January 1997, in keeping with his normal practice, he boarded SS Argonaut. *See* Andrews Dep. at 28.

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4. In light of the entry in the deck log stating that the ship did not dock until 6:48 o'clock a.m., Andrews testimony that he boarded the vessel at 6:30 o'clock a.m. appears to be incorrect. Nevertheless, this discrepancy is immaterial to the resolution of the Motion for Summary Judgment.

Upon boarding SS Argonaut, Andrews testified that he observed a layer of ice between a half inch and one inch in thickness. *See id.* at 26. Andrews testified AMS had been hired to "put salt down and shovel the snow or ice that would be there from the salt." *Id.* at 23.

Andrews indicated that he met with the Chief Mate to discuss the stowage plan for the vessel. *See id.* at 29, 33. After this meeting, which lasted approximately thirty minutes, Andrews testified that he went to check the progress of the AMS workers in clearing the snow and ice. *See id.* at 35, 43. Andrews testified he walked "the fore and aft, the starboard passageway looking down the authorized ship's passageways, walkways" and found that the AMS workers were performing ice and snow removal procedures. *See id.* at 44. Upon seeing the AMS workers performing the snow and ice removal, Andrews left the vessel to resume his other job responsibilities. Andrews experienced no difficulty while walking on the deck of SS Argonaut. *See id.* at 48.

Dino testified that he was on the dock around 8:00 o'clock a.m. when unlashing began on SS Argonaut and he "never saw Charles Andrews or Scott Stahl on the dock or on the Argonaut." Dino Certification ¶ 3. However, Dino acknowledged in substance that he was off the dock when he stated that at 8:00 o'clock a.m. he went to the office area to warn up and see the schedule for his gang. *See id.* at ¶ 7. Manuel Trueba ("Trueba"), a member of Dino's gang, also testified that he did not see Stahl in the vicinity of SS Argonaut before 9:30 o'clock a.m. *See* Leonard Certification, Exhibit D (Certification of Manuel Trueba)

("Trueba Certification") ¶ 3.[5] Trueba did testify, however, that as a longshore worker he worked through all kinds of weather and that the ice on the deck of SS Argonaut was the type of condition he had to "confront and work around as best [he could] in order to keep the ship on schedule." *Id.* at ¶ 5.

Although Dino testified that he noticed ice on the vessel, he did not warn his gang to take any precautions and, indeed, he did not himself take any particular precautions. *See* J. Dino Dep. at 50-51. As well, Dino testified that even though Maher always had a safety man on duty, he did not speak with him on 18 January 1997. *See id.* at 52, 82-83; *see also* Stahl Declaration ¶ 21. In fact, Dino testified that the presence of ice did not constitute a reason to call the safety man. *See* J. Dino Dep. at 51-53.

4. *The Accident*

Around 9:00 o'clock a.m., Stahl asked Dino to address a problem Robert Ruiz ("Ruiz"), a relatively new crane operator in Dino's gang, was having in removing one of the hatches from the ship. *See id.* at 57. Dino boarded the vessel via the gangway and walked along the open weather deck to the hatch his gang was working. *See id.* at 59-60.

Dino testified he was the first member of the gang to board the ship. *See id.* at 51. Dino noticed another gang working on a different hatch at the time. *See id.* at 61. Most

5. The statements of Dino and Trueba do not create a genuine issue of material fact because neither contests the presence of Stahl on the vessel. The issue is not whether either Dino or Trueba "saw" Stahl on the deck or on the vessel.

of the longshore workers carrying out cargo operations were working from the dock or off "shoe boxes", platforms which pick the longshore workers up and lift them onto the containers. *Id.* at 31-32. Dino explained:

> Lately we do most of our working from the dock to the ship rather than being on the deck of the ship. We don't normally go onto the deck of the ship now, until the containers are cleared off the ship, then we go down below. Before we would be on the ship and handling cargo up there, but now because of safety reasons they have us working from the dock.

Id. at 30.

Upon reaching the hatch area his gang was working, Dino checked to see if the hatch cover was "undogged", or unlatched, to ensure that his gang did not lose additional time looking for a ship's mate to perform the function. *See id.* at 61. Dino noticed the hatch cover was undogged. *See id.* at 62. Dino then moved to the forward corner of the hatch and waited for his gang to unload the containers stacked on top of the hatch cover. *See id.* at 67. Dino estimated that he moved around the deck for approximately twenty minutes while his crew unloaded the containers resting on the hatch cover. *See id.* at 67-68. After removing the containers, the hatch cover would be removed using a Maher shore-side crane with a forty foot spreader bar. *See id.* at 70-71.

Dino testified that the gang "hooked up the inshore cover without incident and took it out." *Id.* at 72. Ruiz began having

difficulty locking the spreader, the equipment used to remove the hatch covers, onto the second hatch cover in order to remove it from the hatch. *See id.* At 72-73. Aware of this difficulty, Dino ordered Trueba to ready the dumbbells, adapters used to lock the hatch cover, if Ruiz needed them. *See id.* at 73. To assist Ruiz with locking the spreader, Dino walked around the deck between the first and second hatch. *See id.* at 75. When Dino was halfway past the first hatch cover, Ruiz was able to lock the spreader and he began to raise the cover. *See id.* at 76. In response to this action, Dino testified that he "had to get out of the way." *Id.* To avoid contact with the hatch cover, Dino backed up quickly and testified he slipped on what he believed was ice. *See id.* at 81-82.[6] Dino fell back and was injured.

5. *Dino's Contentions*

Plaintiffs *argue* Defendants were negligent for turning over the ship to Maher while the deck "was laden with ice." *See* Opposition Brief at 1. Plaintiffs offer pictures of the deck, which show ice on the railings, hatch covers and ship

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6. Q. Now, you said that you — do you know what you slipped on, by the way?

A. No, I don't.

Q. So you don't know if you slipped on ice or oil or anything you —

A. It was slippery enough. It was ice.

J. Dino Dep. at 81.

equipment, and certifications of several members of Dino's gang stating that the deck was covered in ice. *See* Leonard Certification, Exhibit E (picture taken of the deck at noon on 18 January 1997); Leonard Certification, Exhibit C (Certification of Roberto Ruiz); Leonard Certification, Exhibit D (Certification of Manuel Trueba).

Plaintiffs *argue* that Farrell "knew the ship was not reasonably safe for cargo operations and that is why Farrell requested assistance from AMS to assist the ship's captain." Opposition Brief at 5-6. Plaintiffs *argue* that Farrell intended AMS would have two hours to remove ice and snow from the deck when Andrews called and ordered the crew on 17 January 1997. *See id.* at 3. Yet due to delays, Plaintiffs *argue* the crew was afforded only thirty minutes to perform the snow and ice removal services, before turning to their unlashing responsibilities. *See id.* at 5; Deck Log. Plaintiffs *argue* the time AMS had to clear the decks was insufficient and that Andrews and Stahl should not be believed concerning the condition of the deck. *See* Opposition Brief at 6, 11; *but see* Stahl Declaration ¶ 15.

Plaintiffs contend these arguments create genuine issues of material fact concerning whether Farrell acted reasonably, whether the thirty minutes of snow and ice removal was sufficient and whether the inspections were deficient. *See* Opposition Brief at 11. However, Plaintiffs do not offer or point to any evidence to support these arguments. Moreover, as noted, Plaintiffs failed to offer any expert testimony concerning the reasonableness of how or when Farrell acted or the duration of snow removal or the adequacy of the inspections.

Appendix B

Plaintiffs *argue* the salt the AMS crew placed on the deck was ineffective due to the cold weather. *See id.* Plaintiffs, however, offer no expert testimony for this proposition. Plaintiffs *argue* this presents another fact question — whether the salting itself demonstrated reasonable care to discharge Defendants' duty under Section 905(b). *See id.*

Plaintiffs *argue* Farrell violated the duty to warn the stevedore of latent defects, namely the ice on the decks of SS Argonaut. *See id.* at 12. Plaintiffs also *argue* Defendants knew or should have known that the longshore workers would confront the icy decks rather than avoiding the danger posed by the ice or ceasing stevedore operations. *See id.* Again, Plaintiffs fail to point to evidence, and fail to offer expert testimony, to establish this argument.

Discussion

A. *Summary Judgment Standard*

To prevail on a motion for summary judgment, the moving party must establish "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The present task is to determine whether genuine issues of material fact exist and whether Farrell and AMS are entitled to judgment as a matter of law.

A District Court may not resolve factual disputes in a motion for summary judgment. *See Linan-Faye Constr. Co. v. Housing Auth.*, 49 F.3d 915, 926-27 (3d Cir. 1995) ("[A]t

the summary judgment stage, 'the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' ") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)); *Desvi, Inc. v. Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir. 1992) ("[T]hreshold inquiry is whether there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party' ") (citations omitted).

In considering a motion for summary judgment, all evidence submitted "must be viewed in the light most favorable to the nonmoving party and all inferences must be drawn in that party's favor." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1077 (3d Cir. 1992) (citing *Erie Telecommunications v. Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Kowalski v. L & F Products*, 82 F.3d 1283, 1288 (3d Cir. 1996); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 & n.2 (3d Cir. 1983) (the court must resolve "all inferences, doubts and issues of credibility . . . against the moving party"), *cert. dismissed*, 465 U.S. 1091 (1984).

Although the summary judgment hurdle is difficult to overcome, it is not insurmountable. As Rule 56(e) makes clear, once the moving party files a properly supported motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine issue of material fact. *See* Fed.R.Civ.P. 56(e); *see also Anderson*, 477 U.S. at 256.

As the Supreme Court indicated in *Matsushita*, once the moving party has demonstrated the absence of a genuine

issue of material fact, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." 475 U.S. at 586. Indeed, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita*, 475 U.S. at 586-87 (emphasis in original) (citations omitted). In other words, the inquiry involves determining " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Brown v. Grabowski*, 922 F.2d 1097, 1111 (3d Cir. 1990) (quoting *Anderson*, 477 U.S. at 251-52) *cert. denied*, 501 U.S. 1218 (1991).

"[T]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *Gomez v. Allegheny Health Serv., Inc.*, 71 F.3d 1079, 1085 (3d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *see also Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125; 1130-31 (3d Cir. 1995); *United States v. 717 So. Woodward St.*, 2 F.3d 529, 533 (3d Cir. 1993) ("Although entitled to the benefit of all justifiable inferences from the evidence, the nonmoving party may not . . . withstand summary judgment by resting on mere allegations or denials in the pleadings.") (citations omitted); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 500 (D.N.J. 1997) ("[T]he non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial.") (citations

omitted); *Nevets C.M., Inc. v. Nissho Iwai Am. Corp.*, 726 F. Supp. 525, 534 (D.N.J. 1989), *aff'd without op'n*, 899 F.2d 1218 (3d Cir. 1990).

"The nonmoving party creates a genuine issue of material fact if [he or she] provides sufficient evidence to allow a reasonable jury to find for him [or her] at trial." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 330 (3d Cir. 1995) (citations omitted). If the nonmovant fails to make a sufficient showing regarding an essential element of his or her case upon which he or she will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial and summary judgment must be granted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986); *Brewer*, 72 F.3d at 330; *Siegel*, 54 F.3d at 1130-31; *see also Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993) ("Summary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant").

In *Anderson*, the Court held that "[i]f the evidence [submitted by the non-movant] is merely colorable, or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50 (citations omitted). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248; *see also Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993) (observing that for issue to be considered genuine, nonmoving party must adduce more than a mere scintilla of evidence in its

favor). In addition, when the factual context renders a claim implausible, the nonmovant has a heavier burden of production in opposing a motion for summary judgment. *Matsushita*, 475 U.S. at 587. "Summary judgment may present the district court with an opportunity to dispose of meritless cases and avoid wasteful trials." *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996) (citing *Celotex*, 477 U.S. at 327).

Discovery in this case is completed. A review of all the submissions reveals no genuine factual dispute that can be described as "material" in light of the relevant case law. Accordingly, judgment may be awarded as a matter of law.

B. *Recovery Under the Act*

Plaintiffs bring this action against Farrell under Section 905(b) of the Act to recover damages for the physical injuries Dino suffered. Section 905(b) of the Act provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the

> negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

The Act established a comprehensive workers' compensation program for longshoremen and their families. *See Serbin v. Bora Corp., Ltd.*, 96 F.3d 66, 70 (3d Cir. 1996); *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 548 (3d Cir. 1994). The 1972 amendments to the Act increased the benefits payable to an injured longshoreman, abolished the longshoreman's strict liability cause of action against the vessel, and insulated the employer from third party liability to the vessel for the worker's injury. *See Howlett v. Birkdale Shipping*, 512 U.S. 92, 97 (1994); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981).

The Act places primary responsibility for the safety of longshore workers on the shoulders of their employers, the stevedores. *See* 33 U.S.C. § 941 ("Section 941"). Section 941 requires the stevedore, as the longshore worker's employer, to provide a "reasonably safe" place to work and to take the safeguards necessary to avoid injuries. *See id.* Congress altered the statutory responsibilities to reflect the belief that stevedores are in the best position to prevent

injuries to longshore workers. *See Howlett*, 512 U.S. at 97; *Scindia*, 451 U.S. at 165, 171. The Act, as amended, grants an injured longshore worker primary recovery against his stevedore employer, and limits the liability that may be imposed against the vessel. *See* 33 U.S.C. § 905(b).

Section 905(b) of the Act provides longshoremen a cause of action for injuries resulting from the negligence of a ship or its crew. *See* 33 U.S.C. § 905(b); *see also Howlett*, 512 U.S. at 97. The Act, however, does not specify what acts constitute negligence or what duties are owed by shipowners to longshore workers. *See* 33 U.S.C. § 905(b). Having determined that vessels are liable to longshore and harbor workers for negligence, Congress left it to the courts to define the contours of vessel negligence. *See Scindia*, 451 U.S. at 165-66. ". . . Congress intended that the scope of a shipowner's liability would evolve under general common law principles." *Serbin*, 96 F.3d at 70 (citing H.R.Rep. No. 1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4704).

In *Scindia*, the Court determined that a vessel may be liable for negligence under one of three duties imposed by Section 905(b). *See* 451 U.S. at 167; *see also Howlett*, 512 U.S. at 98; *Serbin*, 96 F.3d at 70; *Davis*, 16 F.3d at 537; *Kirsch v. Plovidba*, 971 F.2d 1026, 1028 (3d Cir. 1992). These duties are the turnover duty or the duty to warn, the active operations duty and the duty to intervene. *See Howlett*, 512 U.S. at 98; *Serbin*, 96 F.3d at 70; *Davis*, 16 F.3d at 537; *Kirsch*, 971 F.2d at 1028. The Court further observed that a shipowner's duties under the Act may be supplemented through custom, contract or existing laws. *See Scindia*, 451 U.S. at 172.

Appendix B

The "turnover duty" applies at the time the vessel initially gives control of the ship to the stevedore. *See Howlett*, 512 U.S. at 98. The "active operations/control duty" applies once the stevedoring operations have commenced. *See id.* This duty requires that a shipowner must exercise reasonable care to prevent injuries to longshoremen when it actively involves itself in cargo operations or when it actively controls the vessel. The "duty to intervene" concerns conduct after turnover "with regard to cargo operations in areas under the principal control of the independent stevedore." *Id.* The duty to intervene arises when a vessel knows of a hazard posed by defective equipment that the stevedore has continued to use and which poses "an unreasonable risk of harm to the longshoremen." *Scindia*, 451 U.S. at 175.

Plaintiffs *argue* that Defendants, by failing to remove the ice from the deck, were negligent in failing to turn over the ship in a reasonably safe condition. *See* Opposition Brief at 2. In addition, Plaintiffs *argue* Defendants breached the turnover duty by failing to warn of the slippery condition on deck. *See id.* at 12. Finally, Plaintiffs *argue* Defendants breached the turnover duty because Farrell should have expected the stevedore could not or would not avoid the danger posed by the ice, but rather would confront the weather conditions. *See id.* Again, Plaintiffs have failed to offer or to point to evidence to support these arguments; there is no expert report or opinion from Plaintiffs to support any of these contentions.

Appendix B

1. *The Turn Over Duty*

The turnover duty imposes " 'both a duty to provide safe conditions and a corollary duty to warn of known, nonobvious hazards' " before the ship is turned over to the stevedore's control. *See Serbin*, 96 F.3d at 70 (quoting *Kirsch*, 971 F.2d at 1028); *see also Howlett*, 512 U.S. at 98. The Court stated:

> A vessel must "**exercise ordinary care** under the circumstances" to turn over the ship and its equipment and appliances "in such condition that **an expert and experienced stevedoring contractor,** mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care" to carry on cargo operations "with reasonable safety to persons and property."

Howlett, 512 U.S. at 98 (quoting *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969)) (emphasis added). Significantly, Plaintiffs have not proffered testimony or an opinion from an expert to establish in this case the precise contours of what "ordinary care" is, how Farrell failed to exercise such care, what an "expert and experienced stevedore contractor" would or would not do in the circumstances and how that would impact on the turnover duty of Farrell.

An owner of a vessel ordinarily "will not be liable to a longshore worker injured by an obvious hazard because the

shipowner's duty is only to provide a workplace where skilled longshore workers can operate safely." *Id.*; *McCourt v. Mitsui O.S.K. Lines America, Inc.*, 921 F. Supp. 1315, 1318 (D.N.J. 1996) (describing a deck opening without a ramp as an obvious danger). "As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards." *Scindia*, 451 U.S. at 170. This is based upon the fact that the Act holds the stevedore principally responsible for ensuring the safety of longshore workers. *See id.* at 170; *see also* 33 U.S.C. § 941. Indeed, the ability to rely upon a expert stevedore implies that certain open and obvious hazards need not be remedied, provided an expert stevedore could safely work around them. *See Kirsch*, 971 F.2d at 1030 (citing *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1208 (9th Cir. 1989)). As explained, Plaintiffs have not provided an expert report or opinion that an expert stevedore could not or should not work around the snow and ice hazard presented in this case.

As mentioned, this Circuit has stated:

> [A] shipowner can, ordinarily, reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid these hazards where practical to do so. . . . Thus, where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence.

Kirsch, 971 F.2d at 1030. Plaintiffs have not demonstrated through expert testimony or otherwise that the hazard was

not easily avoidable. While "in many cases the obviousness of a hazard under all circumstances, which includes as a key element the appreciability of the danger, will be a jury question," the Third Circuit has granted summary judgment when the evidence indicates a hazard was open and the shipowner was reasonable in relying upon the stevedore to eliminate the hazard. *Id.* at 1033.

In *Kirsch*, the shipowner turned over its vessel for loading with a large oil slick in the cargo hold. *See* 971 F.2d at 1027. Although the stevedore noticed the oil spill, no action was taken to clean, treat or otherwise remedy the spill. *See id.* During cargo operations, the plaintiff stepped in the oil. *See id.* The plaintiff later slipped as a result of the oil left on the bottoms of his shoes. *See id.* The Circuit affirmed the grant of summary judgment because the oil slick that caused the accident was obvious and known to the stevedore. *See id.* at 1034.

The Circuit determined that the shipowner was reasonable in assuming the stevedore would remedy the oil spill. *See id.* at 1033. Specifically, the Circuit commented that the existence of an Occupational Safety and Hazard Administration ("OSHA") regulation requiring the stevedore to remedy slippery conditions, as they occur, suggests the shipowner was reasonable in relying upon the stevedore to remedy the oil spill. *See id.* Further, the Circuit commented that sawdust was available to treat the oil spill and that the plaintiff did not allege that it would be impractical for the stevedore to treat the oil spill before commencing cargo operations. *See id.* In addition, the Circuit found that the plaintiff offered no evidence indicating that the shipowner

was aware the stevedore and longshore workers would confront the hazard rather than avoiding it or remedying it. *See id.* at 1034. This case is no different.

In certain circumstances, however, a shipowner cannot reasonably rely on longshore workers to avoid obvious hazards. *See Kirsch*, 971 F.2d at 1030. When a hazard is obvious yet practically unavoidable, the shipowner cannot rely upon the stevedore or the longshore worker to avoid the hazard. *See id.* This entails a consideration of whether "under all the circumstances, safer alternatives were impractical." *Id.* (citing *Morris v. Compagnie Maritime Des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987)) (noting a plaintiff need not show there was no safer alternatives, but rather, that under the circumstances safer alternatives were unduly impractical). The Plaintiffs have not shown through the production of expert testimony, or otherwise, safer alternatives were impractical or unavailable.

A shipowner may be negligent in not eliminating the hazard, if a shipowner would reasonably be aware that a stevedore and the longshore workers would not avoid an obvious hazard, but would instead confront the hazard. *See id.* at 1030-1031; *Scindia*, 451 U.S. at 174-175 ("mere knowledge of the danger [is] not sufficient in itself to fasten such a duty on the shipowner, but if the shipowner should anticipate that the stevedore will not or cannot correct the danger *and that the longshoremen cannot avoid it*, then the shipowner's duty is triggered to take steps . . . to eliminate the hazard." (emphasis added)). This may be shown through custom, contract or other laws supplementing a shipowner's duties under the Act. *See Scindia*, 451 U.S. at 172, 176. Thus,

"a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely." *Kirsch*, 971 F.2d at 1031. This is not the case presented by Plaintiffs through expert opinion or otherwise.

In *Howlett*, the Court considered the contours of the duty to warn of latent defects. *See* 512 U.S. at 99. The Court specifically observed that the duty to warn must be considered in light of the stevedore's statutory duty to ensure the safety of longshore workers. *See id.* Further, the Court stated the duty to warn attaches only to "hazards that would be neither obvious to nor anticipated by a competent stevedore in the ordinary course of cargo operations." *Id.* In so holding, the Court rejected imposing upon a shipowner the duty to inspect the cargo area before turnover. *See id.* at 104. Further, when hazards are obvious there can be no recovery under Section 905(b) for a shipowner's failure to warn. *See id.*

2. *Application of the Turnover Duty in the Instant Case*

In order to prevail on the Motion for Summary Judgment, Defendants must establish no genuine issues of material fact exist concerning whether Defendants acted reasonably when they turned over the ship to Maher. Plaintiffs *argue* genuine issues of material fact exist concerning whether Farrell acted reasonably by turning over the SS Argonaut with ice on the deck, whether the thirty minutes of snow and ice removal

was sufficient and whether the alleged inspections were deficient. *See* Opposition Brief at 11. Further, Plaintiffs *argue* the effectiveness of the salting due to the cold weather and the adequacy of salting as a method of eliminating the hazard also raise fact questions. *See id.* Plaintiffs also *argue* that there are genuine issues of material fact concerning Farrell's turnover duty to warn of latent defects. *See id.* at 12. Indeed, Plaintiffs *argue* whether the snow and ice constituted a latent defect is a genuine issue of material fact which precludes summary judgment. *See id.* at 16-17. Finally, Plaintiffs *argue* whether Farrell knew the longshore workers could not or would not avoid the danger posed by the icy deck prevents summary judgment. *See id.* at 12. As explained, Plaintiffs have not offered expert testimony, or other evidence, to support *any* of these arguments.

As the Circuit explained in *Kirsch*, the significant distinction separating the turnover duty from the duty to intervene is that the turnover duty is concerned with the conduct before cargo operations commence while the duty to intervene covers conduct following turnover. *See* 971 F.2d at 1029. This case concerns allegations of an injury which occurred during cargo operations, after the ship had been turned over to the stevedore. At that stage, the owner of the vessel had no continuing duty to inspect, or indeed supervise cargo operations conducted by the stevedore following turnover. *See id.* Because the turnover duty requires the owner of the ship to tender it in a condition such that an expert stevedore acting with reasonable care could conduct cargo operations safely, the requirement to warn of a hidden hazard is significant. However, in this case because Dino conceded the ice conditions were obvious, the duty to warn of such "hidden hazard" is not relevant. *See id.*

Appendix B

The *Kirsch* court adopted the observation made by the Ninth Circuit that

> the fact that cargo operations will be conducted by an "expert and experienced" stevedore "implies that certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them."

971 F.2d at 1029-1030 (quoting *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1208 (9th Cir. 1989)). This is the rationale why an owner of a vessel can ordinarily rely on a stevedore and its employees to both note obvious hazards and to take steps to avoid them. *See id.* at 1030.

The *Kirsch* opinion and its teachings are particularly instructive. *Kirsch* restated the principle that "where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence." *Id.* Significantly, *Kirsch* stated:

> [I]f in this case we could assume that the oil slick were obvious to a reasonably prudent stevedore and its longshore workers but small enough to be avoided easily by skirting it, we would conclude that the stevedoring operations could be conducted safely, and hence that the shipowner was not negligent in failing to provide a safe workplace.

Id.

Appendix B

The instant case presents a situation similar to that presented in *Kirsch*. SS Argonaut alerted Andrews, Farrell's Port Manager, before its arrival of the snow and ice conditions. Farrell retained AMS to perform snow and ice removal. Andrews also alerted the stevedore, Maher, to the conditions of the vessel. Upon the arrival, and before cargo operations began, AMS began snow and ice removal. Although cold weather operations are common and it is common for a vessel to arrive with accumulations of snow and ice, the Ship Superintendent, Stahl, testified that before turnover he inspected the cargo operations area (and indeed the whole ship) and found the vessel to be free from snow and ice.

Dino testified he noticed and was aware of the snow and ice, that he did not warn his gang to take precautions, that he did not take precautions, that he did not speak with Maher's safety man who was on duty and that the presence of ice did not constitute a reason to call the safety man.

Drawing all inferences in favor of Plaintiffs, it will be assumed the ice was pervasive and covered the area where Dino was injured. In fact, the snow and ice were obvious and it appears the stevedore, and its employees, were thoroughly aware of its presence. These expert and experienced longshore workers are skilled workers and could be expected to work around the conditions of the day. This much is clear from the testimony of Dino who said he did not call the safety man or advise his gang to take precautions or himself take precautions because the presence of the snow and ice did not constitute a reason to do so.

Appendix B

Dino, like Kirsch, candidly admitted the conditions were obvious and he was aware of them before he entered on the vessel. *See Kirsch*, 971 F.2d at 1033. Like Kirsch, Dino appreciated the conditions. *See id.* The Circuit in *Kirsch* assumed the oil slick was so large that Kirsch and others could not have avoided the oil in the area in question. Kirsch argued that alone sufficed to defeat summary judgment. The Circuit disagreed. The Circuit stated the stevedore and the longshore workers had another option — eliminate the obvious hazard by treating or cleaning up the oil slick themselves or by telling the ship's crew to clean it up. *See id.* Likewise, here it will be assumed the snow and ice were pervasive and could not be avoided. Nevertheless, Dino had the same options as Kirsch. Salt was available, the AMS workers were available and the stevedore's safety man was available.

In *Kirsch*, the Circuit referenced OSHA regulations which indicated stevedores are "competent to treat oil spills, a typical form of slippery condition during cargo operations." *Id.* The presence of snow and ice during cold weather operations is typical and snow and ice are typical forms of slippery conditions during cold weather operations. Stevedores are as competent to treat slippery snow and ice conditions, as they are to treat oil spills.

Although Defendants have established it is common during cold weather for vessels to arrive with an accumulation of ice and snow, it is known in the stevedoring industry in general, and at Maher in particular, that if snow and ice render working conditions unsafe, the longshore workers should stop work, Dino has not established

otherwise. There is nothing in the submissions which suggests the longshore workers would have continued cargo operations despite the presence of snow and ice, if such rendered the area unsafe.

As the *Kirsch* decision instructs:

> [A] shipowner can, ordinarily, reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid those hazards where practical to do so.

Id. at 1030.

Defendants had a duty to turnover SS Argonaut

> "in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to persons and property."

Howlett, 512 U.S. at 98 (quoting *Federal Marine Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404 (1969)). Defendants were entitled to rely upon Maher to ensure the safety of the longshore workers.

Plaintiffs' own testimony concerning the use of shoe boxes to work around unsafe conditions on deck indicates

that Maher, as an expert stevedore, could, and indeed did, work around the icy deck conditions. *See* J. Dino Dep. at 30. In fact, Dino testified that due to OSHA regulations longshore workers rarely worked from the ships' decks due to safety concerns. *See id.* In light of the Circuit's analysis in *Kirsch*, Defendants were reasonable in relying upon Maher to comply with OSHA regulations. *See Kirsch*, 971 F.2d at 1033 (noting that the existence of an OSHA regulation requiring the stevedore to remedy slippery conditions *as they occur* indicates a shipowner acts in a reasonable manner when relying upon the stevedore to comply with the OSHA regulation).

Plaintiffs have not raised a genuine issue of material fact; the ice on the ship was open and obvious, and significantly, Dino was aware of it. *See Howlett*, 512 U.S. at 98; *Kirsch*, 971 F.2d at 1030. Plaintiffs rely upon *Bellomo v. United Arab Shipping*, 863 F. Supp. 107 (S.D.N.Y. 1994), *arguing* that ice by its very nature poses a latent condition. *See* Opposition Brief at 16. In *Bellomo*, a longshoreman slipped and fell during cargo operations on ice that was underneath snow on a vessel's deck. *See Bellomo*, 863 F. Supp. at 108. The court concluded that whether the ice was on the deck at the time of turnover presented a genuine issue of material fact precluding summary judgment. *See id.* at 111.

Further, the court noted that whether the ice was a latent condition presented a question of fact which prevented the entry of summary judgment. *See id.* In so holding, *Bellomo* relied upon the plaintiff's testimony that he could not see the ice under the snow. *See id.* In contrast, Dino, a longshore worker for more than thirty years, admitted in his testimony

that he was aware of the ice and did not deem the ice to be the kind of a safety hazard he would warn his gang about or that would cause him to take precautions or notify the safety officer on duty for Maher. *See* J. Dino Dep. at 50-53.

Plaintiffs have not established a case under the turnover duty. *See Howlett*, 512 U.S. at 99 (requiring shipowners to warn stevedores of latent conditions). Plaintiffs *argue* that no warning signs were posted on the ship indicating that the decks were icy. *See* J. Dino Dep. at 50. The record is clear, however, that the ice was not a hidden condition. *See id.* at 50-53. Further, Farrell warned Maher about the ice on the deck. *See* Andrews Dep. at 116; Stahl Declaration ¶ 12. Accordingly, Defendants could expect that Maher, the stevedore, would fulfill its statutory obligations under Section 941 by passing along the warnings to the longshore workers or remedying the hazard. *See Howlett*, 512 U.S. at 99.

The general statement by Trueba, *see* Trueba Certification ¶ 5, that longshore workers work through all weather conditions, including ice, does not create genuine issues of material fact about the Defendants' knowledge that the longshore workers would confront the ice rather than avoiding it. *See Kirsch*, 971 F.2d at 1034. The statement in no way suggests that Defendants knew or should have known that the stevedore would ignore the statutory duty to keep longshore workers safe imposed by Section 941 and would begin cargo operations despite the existence of a safety hazard that could not be avoided during operations. In fact, Dino's testimony regarding the use of shoe boxes suggests that Defendants were reasonable in relying upon Maher to

protect the longshore workers from unsafe deck conditions. *See* J. Dino Dep. at 30. In addition, testimony from Stahl indicates that the stevedore was aware of the risks posed by ice and accordingly he conducted an inspection of the decks before commencing stevedore operations. *See* Stahl Declaration ¶ 15. It is this testimony which supports Defendants' position that they relied upon the stevedore to perform its statutory duty under Section 941 to ensure the safety of the longshore workers and that the Defendants believed that the stevedore would remedy any safety hazards before the start of cargo operations. *See Kirsch*, 971 F.2d at 1034. Because the asserted danger was obvious but easily avoidable, the Defendants are not liable for negligence. *See id.* at 1030. Affording Plaintiffs all reasonable inferences, no genuine issue of material fact exists. Accordingly, the Motion for Summary Judgment is granted.

Conclusion

For the reasons stated, the Motion for Summary Judgment is granted.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR.,
U.S.D.J.

AJL/cfw

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-1155 (AJL)

JOSEPH DINO and PATRICIA DINO,

Plaintiff,

v.

FARRELL LINES, INC., SS ARGONAUT, ABC VESSEL OWNER 1-10 (10 being fictitious and unknown), JOHN DOE MASTER OFFICER 1-10 (10 being fictitious and unknown), XYZ MAINTENANCE COMPANY 1-10 (10 being fictitious and unknown) v. AMERICAN MARITIME SERVICES, INC.

ORDER

This matter having come before this Court upon the motion for summary judgment (the "Motion for Summary Judgment"); and this court having considered the submissions of the parties; and for the reasons set forth in a Letter-Opinion, filed on this date; and for good cause shown,

IT IS, on this 1st day of December 1999,

ORDERED, that the Motion for Summary Judgment is granted in favor of the Defendants, and it is further

ORDERED, that this matter be and hereby is dismissed with prejudice.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR.,
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 27, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-6119

JOSEPH DINO; PATRICIA DINO,

Appellants

v.

FARRELL LINES, INC.; SS ARGONAUT; ABC VESSEL OWNER 1-10, (being fictitious and unknown); PDQ VESSEL LESSEE 1-10, (being fictitious and unknown); JOHN DOE MASTER OFFICER 1-10, (being fictitious and unknown); XYZ MAINTENANCE COMPANY 1-10, (being fictitious and unknown)

FARRELL LINES, INC.,

Third-Party Plaintiff

v.

AMERICAN MARITIME SERVICES, INC.,

Third-Party Defendant

Joseph Dino and Patricia Dino,

Appellants

Appendix C

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO
and FUENTES, *Circuit Judges*,
and STAPLETON, *Senior Circuit Judges**

The petition for rehearing filed by **Appellee, American Maritime Services of New York, Inc.**, and **Appellee, Farrell Lines Incorporated** in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petitions for rehearing are hereby **DENIED**.

IT IS SO ORDERED.

By the Court,

s/ Theodore A. McKee
Hon. Theodore A. McKee
Circuit Judge

DATED: FEB 27 2001

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* Judge Stapleton's vote is limited to panel rehearing only.

APPENDIX D — RELEVANT STATUTE

33 U.S.C. § 905(b)

§ 905. Exclusiveness of liability

* * *

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

* * * *

Supreme Court, U.S.
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No. 00-1620

IN THE

Supreme Court of the United States

FARRELL LINES INCORPORATED,

Petitioner,

v.

JOSEPH DINO, PATRICIA DINO, and AMERICAN MARITIME SERVICES OF NEW YORK, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE OF RESPONDENT AMERICAN MARITIME SERVICES OF NEW YORK, INC. IN SUPPORT OF PETITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent American Maritime Services of New York, Inc. (hereinafter "American") is a privately owned corporation that has no publicly traded stock.

REASONS FOR GRANTING THE WRIT

Respondent American supports the Petitioner's Petition For a Writ of Certiorari and agrees with the arguments set forth in the Petition. Respondent American is a maritime services contractor that was engaged by Petitioner to assist it in the removal of snow and ice from the deck of Petitioner's ship, the S/S ARGONAUT, to meet Petitioner's turnover duty under Section 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA").

A. The United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with a federal statute and with decisional law of this Court interpreting that statute.

In reversing the district court's grant of summary judgment to Petitioner and Respondent American, the United States Court of Appeals for the Third Circuit is in direct conflict with Section 5(b) of the LHWCA (33 U.S.C. § 905(b)) and this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Section 5(b) of the LHWCA, which Congress enacted in 1972, eliminated a longshoreman's right to recover from a shipowner for unseaworthiness, while preserving the longshoreman's right to recover from a shipowner for negligence. As Congress did not recite the acts or omissions of a shipowner that would amount to negligence, the scope of the duty owed to a longshoreman was left to "be resolved through the application of the accepted principles of tort law in the ordinary process of litigation." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972). In 1981, this Court articulated the scope of the shipowner's duty to a longshoreman under Section 5(b), outlining three general duties a shipowner owes to longshoremen: (1) to turn the vessel over in a reasonably safe

condition or to warn of hidden danger; (2) to exercise due care to protect longshoremen from hazards when it maintains active control of the vessel during the stevedoring operations; and (3) to intervene when it has actual knowledge of a hazard and that the stevedore/employer cannot be relied upon to remedy it. *Scindia*, 451 U.S. at 166-167. This first duty, which has come to be called the "turnover duty," is the central issue in this matter. This Court in *Scindia* explained the turnover duty:

> This duty extends at least to exercising ordinary care under the circumstances to have a ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on his cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id.

The United States Court of Appeals for the Third Circuit, in a decision issued in 1992 applying the *Scindia* turnover duty, held that a shipowner may be negligent for failing to eliminate an obvious hazard that could have been eliminated but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely. *Kirsch v. Prekookeanska Plovidba*, 971 F.2d 1026, 1031 (3d Cir. 1992). In *Kirsch*, the Court of Appeals affirmed summary judgment for the shipowner, holding that the shipowner was not negligent with regard to an oil spill in

the hold of a ship, as the longshoreman could have avoided the oil spill by either treating it with sawdust that was available to the stevedore or by requesting the ship's crew to do so. The Court of Appeals in *Kirsch* held that the shipowner was entitled to rely upon the expertise of the longshoremen to exercise reasonable care to carry on their cargo operations with reasonable safety to persons and property.

In reversing the district court's grant of summary judgment to Petitioner and Respondent American, the United States Court of Appeals for the Third Circuit has significantly departed from the turnover duty owed by the shipowner to longshoremen as it was enunciated by this Court in *Scindia* and further defined by its own decision in *Kirsch*. In the decision below, the Court of Appeals held there is no evidence that a longshoreman, Respondent Dino, could have avoided the ice. (App. A at 14a of the Petitioner's Writ of Certiorari). In so holding, the Court of Appeals requires a shipowner to bear the burden of presenting evidence that a longshoreman could have avoided the hazardous condition that was known to him. Therefore, the Court of Appeals is requiring that the shipowner bear the burden of proving it was not negligent, in contrast to the standard established by this Court in *Scindia*, under which a longshoreman must prove that the shipowner was negligent.

This is an important question of federal law, as Congress's enactment of the 1972 amendments to the LHWCA eliminated unseaworthiness as a basis for a shipowner's liability to a longshoreman or harbor worker, and this Court's decision in *Scindia* articulated the standards for shipowner liability based on negligence, including the turnover duty. The 1972 amendments and the *Scindia* negligence standards have since, i.e., for 20 years, governed the shipowner/longshoreman relationship in every port in this country. The decision of the United States Court of Appeals for the Third Circuit below would turn that relationship on its head by shifting the burden

to a shipowner to prove that it was not negligent, and therefore certiorari should be granted, so that this Court can reaffirm the standards for shipowner liability it established 20 years ago in *Scindia*.

B. The decision below also conflicts with a decision of another United States Court of Appeals addressing the same issue.

In *Delange v. Dutra Construction Co.*, 183 F.3d 916 (9th Cir. 1999), an injured worker brought an action against a barge operator seeking compensation under the Jones Act (46 U.S.C. § 688) and the LHWCA. The district court granted summary judgment for the defendant on both claims. The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment for the defendant on the LHWCA claim but remanded the Jones Act claim for further consideration. *Id.* at 919.

With respect to the LHWCA claim, the only issue was whether the defendant satisfied its turnover duty. *Id.* at 921. The plaintiff had alleged that the accident that severed his fingers was caused by a hidden defect in the barge's spud mechanism. In particular, the plaintiff maintained that he had difficulty removing the pin, because it was bent, a defect he could not have identified in time to avoid the accident, as the pin was hidden in the spud. *Id.*

The United States Court of Appeals for the Ninth Circuit held that because the plaintiff had introduced evidence that the captain found no problems during an inspection of the barge and the tug on the morning of the accident, the plaintiff was required to offer evidence of specific facts showing his negligence claim was triable. *Id.* Moreover, the court noted that "when the nonmoving party relies only on his own affidavit to oppose summary judgment, '[he] cannot rely on conclusory

allegations unsupported by factual data to create an issue of material fact,' " *Id.* (quoting *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)).

In its decision in this case, the United States Court of Appeals for the Third Circuit, in reversing a summary judgment entered by the district court in favor of Petitioner and Respondent American, has articulated a standard and burden for proof in turnover duty cases that directly conflicts with the rule enunciated by the United States Court of Appeals for the Ninth Circuit in *Delange*. Accordingly, this Court should grant the Petition for Writ of Certiorari filed by Farrell Lines, Inc. and address this important question of federal law.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari to review the issues governing the proper burden of proof in longshore workers' third party actions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FARRELL LINES INCORPORATED,

Petitioner,

v.

JOSEPH DINO, PATRICIA DINO, AND AMERICAN MARITIME SERVICE OF NEW YORK, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Joseph Dino and Patricia Dino, the Respondents, (hereinafter referred to as "Dino"), respectfully oppose the Petition of Farrell Lines Incorporated (hereinafter the "Petitioner") for Writ of Certiorari. The Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Writ. Specifically, (a) there is no important federal questions which was decided in the Courts below and which conflicts with decisions of another jurisdiction or of a United States Court of Appeals; and (b) the decision from the court below did not address an important question of federal law that has not been settled by this Court. To the contrary, the issue raised by the Petitioner has been addressed, examined, and definitively decided by this Court and followed by the lower courts. For these reasons, the Writ should be denied.

Issue:

I. Whether the Third Circuit Court of Appeals acted in accord with the Supreme Court's decisions, other circuit courts, and legislative intent in determining whether the Petitioner is liable to Dino for personal injuries under the Act?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Respondents' Brief in Opposition To Petition For Writ of Certiorari 1

Counterstatement of the Facts 2

Reasons For Denying the Writ 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Anderson v. Iceland S.S. Co., 585 F.2d 1142, (1st Cir. 1978)..... 8

Biggs v. Logicon, Inc., 663 F.2d 52 (8th Cir. 1981) 8

Citizen v. M/V Triton, 384 F.Supp. 198, (E.D.Tex. 1974).... 8

Davis v. Portline Transportes Maritime International, 16 F.3d 532 (3rd Cir. 1994)..... 8

Edmonds v. Compaignie Generale Transatlantique, 443 U.S. 256, (1979) 4

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 22 L.Ed.2d. 371, 89 S.Ct. 1144 (1969) 6

Griffith v. Wheeling-Pittsburgh Steel Corp., 657 F.2d 25 (3rd Cir. 1981)..... 7

Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994)..... 6, 8

Hugev v. Dampskisaktieselskabet Int'l, 170 F.Supp 601 606 (1959) 8

Jefferson Bank v. Progressive Casualty Insurance Co., 965 F.2d 1274 (3rd Cir. 1992)..... 4

Keller v. United States, 38 F.3d 16 (1st Cir. 1994)..... 8

Kirsch v. Plovidba, 971 F.2d 1026 (3rd Cir. 1992) 6, 7

Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981).....8

Meyer v. Riegel Prods. Corp., 720 F.2d 303, n.2 (3rd Cir. 1983).....5, 8

Morris v. Compagnie Maritime des Chareurs Reunis, S.A., 832 F.2d 67, (5th Cir. 1987).....6

Riggs v. Scindia Steam Nav. Co., 8 F.3d 1442 (9th Cir. 1993).....8, 9

Sarauw v. Oceanic Navigation Corp., 655 F.2d 526, (3rd Cir. 1981).....8

Scindia Steam Navigation Co. v. DeLos Santos, 451 U.S. 156, (1981).....4, 5, 7

Serbin v. Bora Corp. Ltd., 96 F.3d 66 (1996) 8

Spence v. Mariehamns R/S, 766 F.2d 1504, (11th Cir. 1985).....8

Taylor v. Morgan Agencies, 739 F.2d 1384 (9th Cir. 1984).....8

Statutes:

33 U.S.C. § 901 3

33 U.S.C. § 905(b) 2, 3

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph Dino and Patricia Dino, the Respondents, (hereinafter referred to as "Dino"), respectfully oppose the Petition of Farrell Lines Incorporated (hereinafter the "Petitioner") for Writ of Certiorari. The Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Writ. Specifically, (a) there is no important federal questions which was decided in the Courts below and which conflicts with decisions of another jurisdiction or of a United States Court of Appeals; and (b) the decision from the court below did not address an important question of federal law that has not been settled by this Court. To the contrary, the issue raised by the Petitioner has been addressed, examined, and definitively decided by this Court and followed by the lower courts. For these reasons, the Writ should be denied.

COUNTERSTATEMENT OF THE FACTS

Dino worked for Maher Terminals, Inc., a stevedoring company, as a longshore worker in Port Elizabeth, New Jersey. Dino was working as a hatch boss at the time of the accident, that is, he managed a group of workers assigned to a specified area and ensured that cargo was unloaded from ships to the deck.

On January 18, 1997, the Petitioner's ship, the SS Argonaut, arrived at Maher Terminals in New Jersey laden with ice.1 The ship arrived in port at 6:48 a.m. and the crewmen of American Maritime did not board the ship until 7:30 a.m. There was ice formed aboard the ship. Between 9:30 a.m. and 10:00 a.m., Dino, a longshore worker, was called to the ship because the crane operator was having a problem removing one of the hatches from the ship. As the crane operator was lifting the hatch, Dino stepped back and slipped on the icy deck. He attempted to grab the rail, but the rail was covered with ice as well. As a result, Dino fell to the deck and sustained numerous personal and physical injuries.

As a result, Dino filed a suit in the New Jersey Superior Court against the Petitioner pursuant to Section 905(b) of the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. Section 905(b). The Petitioner removed the case to the United States District Court for the District of New Jersey based on diversity of citizenship and admiralty

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1 On January 17, 1997, the ship's master had called the terminals requesting assistance for ice removal upon the ship's arrival at port. The Petitioner hired American Maritime Service of New York, Inc. ("American Maritime") to de-ice and unlash the ship.

jurisdiction. The Petitioner then filed a third party complaint against American Maritime.

REASONS FOR DENYING THE WRIT

The Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. Section 901, et. seq., (the "Act"), establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death. The longshoremen may seek damages in a third party negligence action against the owner of the vessel on which he was injured. 33 U.S.C. Section 905(b).

In 1972, Congress amended the Act which currently states that:

> b) Negligence of a vessel
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person,...may bring an action against such vessel as a third party...If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel...The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

33 U.S.C. Section 905(b).

The amendment eliminated the warranty of seaworthiness and created a cause of action for negligence in favor of an injured longshoreman and against a shipowner. *See Edmonds v. Compaignie Generale Transatlantique*, 443 U.S. 256, 262 (1979). The amendment did not delineate acts or omissions which would amount to negligence. *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156, 165 (1981). The scope of the duty owed longshoreman had to be "resolved through the application of the accepted principles of tort law and the ordinary process of litigation. *Id.* at 165-66 (*citing* H.R. Rep. No. 92-1125, 92nd Cong., 2d Sess. (1972)).

The Third Circuit Court of Appeals reversed the District Court of New Jersey's granting of summary judgment. The Court held that: 1) the Petitioner had failed to present evidence that an obvious shipboard hazard could have been avoided; and 2) that statements indicating that longshoremen work in all weather conditions under time pressures were sufficient to establish Petitioner's negligence. In interpreting applicable case law, the Third Circuit analyzed that the Petitioner should have expected that Dino or his employer would not have corrected or avoided an obvious hazard. The Third Circuit questioned material facts of whether the Petitioner met their duty owed to Dino pursuant to accepted principles of tort law.

Summary Judgment should have never been granted by the District Court since there were genuine issues of material facts. *Jefferson Bank v. Progressive Casualty Insurance Co.*, 965 F.2d 1274, 1278 (3rd Cir. 1992); F.R.C.P. 56(c). In our case, the material fact is whether there was a known hazard, that is ice, on the ship that could have been avoided. All reasonable inferences must be drawn in favor of the non-

movant. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3rd Cir. 1983).

There are three duties that shipowners have to longshoremen: 1) turn the vessel over in a reasonably safe condition and to warn the stevedore of unsafe conditions on the ship; 2) exercise due care to protect longshoreman from hazards when the shipowner maintains active control of the vessel during the stevedoring operation; and 3) intervene when the shipowner has actual knowledge of the hazard and knows, or should know, that the stevedore cannot be relied upon to remedy it. *Scindia*, at 166-67.

In our case, Dino falls into the first duty, that is, the turnover duty, which is comprised both of a duty to provide safe conditions and a duty to warn of dangers. *Id.* The Third Circuit did not create a strict liability standard as argued by the Petitioner, but, in fact, used the standard established in *Scindia:*

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his

> work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to longshoremen.

Id. at 166-67.

The obligation imposed upon the vessel and its crew under the "turnover duty" relates to the condition of the ship upon the commencement of stevedoring operations. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994) (under the turnover duty, a longshoreman would have to prove that 1) the shipowner had knowledge of the condition and 2) the hazard would have been neither obvious nor anticipated by a skilled and competent stevedore); *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 22 L.Ed.2d 371, 89 S.Ct. 1144 (1969). A shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations safely. *Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3rd. Cir. 1992). The Kirsch court also stated that the appropriate standard is to permit liability, even where a hazard is obvious, if safer alternatives are impractical or time-consuming. *Id.* at 1032, *citing, Morris v. Compagnie Maritime des Chareurs Reunis, S.A.*, 832 F.2d 67, 70-71 (5th Cir. 1987). The fact-intensive question is inappropriate to decide on summary judgment and must be given to the jury. *Id.*

Whether Dino could have avoided the ice and whether the Petitioner should have known that Dino would not have avoided the danger were fact questions for the jury. *See also Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25 (3rd Cir. 1981) (a vessel owner was negligent where, prior to commencement of stevedoring operations, the owner knew or should have known of a defect in the hatch covers on the vessel and had reason to believe the stevedore might use a negligent method to remove the hatch cover and yet took no steps to correct the condition).

The Third Circuit read *Scindia* and *Kirsch* together to determine whether the following analysis was completed by the District Court: (1) was there a dangerous condition on the ship when it was turned over (was there snow and ice on the deck when cargo operations began); (2) if so, was it obvious (if it was not obvious, the shipowner had to warn Dino); (3) if the icy condition was obvious, was it practical to avoid the ice; (4) if it was practical to avoid the ice, is there evidence that it is customary for experienced longshoremen to confront the icy conditions rather than stop working or remedying it.

There was conflicting testimony as to the condition and safety of the ship and whether the shipowner acted reasonably in addressing the ice condition and whether the ship was safe at the time it was turned over. A jury's function is to resolve the conflicting material facts, not a motion for summary judgment. *Kirsch, supra.*

By this analysis, the Third Circuit did not create any strict liability but did a fact analysis. There was conflicting evidence of whether the ship was safe when Dino was doing his

work. All inferences and issues of credibility had to be viewed in favor of Dino. *Meyer v. Reigel Products Corp.*, 720 F.3d 303, 307 (3rd Cir. 1983).

The Third Circuit decision did not expand or change duties that were already established in its jurisdiction. *See Howlett, supra*; *Davis v. Portline Transportes Maritime International,* 16 F.3d 532 (3rd Cir. 1994); *Serbin v. Bora Corp. Ltd.*, 96 F.3d 66 (1996) (the ship could be liable if a condition existed which could foreseeably cause injury of which it was aware).

The Third Circuit decision is in accord with decisions from other jurisdictions. *See Citizen v. M/V Triton*, 384 F.Supp. 198, 201 (E.D.Tex. 1974); *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985); *Hugev v. Dampskisaktieselskabet Int'l*, 170 F.Supp 601, 606 (1959); (the shipowner had a duty to see that the danger was removed before proceeding to unload the cargo; the failure of a discharging stevedore to identify a hazard and take appropriate steps to protect the longshoreman is negligence); *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1151 (1st Cir. 1978) (if stowage or the cargo itself represents a risk to the longshoremen, the stevedore has the right to remedy the defect, at the expense of the ship or to discontinue unloading operations); *Taylor v. Moran Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981); *Keller v. United States*, 38 F.3d 16, 32 (1st Cir. 1994); *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526, 529 (3rd Cir. 1981); *Biggs v. Logicon, Inc.*, 663 F.2d 52 (8th Cir. 1981).

The Petitioner alleges that the Third Circuit created a strict liability standard wherein shipowners automatically become liable to longshoremen. In opposite, the Third Circuit stated that there are material facts that must be reviewed to determine whether there was a duty and a breach of that duty to cause the Petitioner to be negligent. *Scindia* is clear that there are times when shipowners are liable – there is no absolute immunity under the statute and the legislatures never intended an absolute bar to injured longshoremen. Therefore, the Third Circuit acted in concert with applicable law rendered by this Court and followed by other Circuit Courts and in accordance with the intent of the Act.

CONCLUSION

The Court should deny *certiorari* since the Third Circuit followed precedent case law. This case does not raise significant issues or a conflict among the circuits, nor will it have an impact on legislation involving personal injuries suffered by longshore workers. There is no reason for this Court to conduct further review, and this Writ should therefore be denied.

Respectfully Submitted,

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